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IN THE

# Supreme Court of the United States

OCTOBER TERM, A. D. 1960

## No. 202

DOER ANDERSON and DOROTHY ANDERSON, his wife; MONT I. ANDERSON and WANDA LEE ANDERSON, his wife; et al.,

Petitioners,

vs.

COUNTY BOARD OF SCHOOL TRUSTEES OF McHENRY COUNTY, ILLINOIS,

Respondent.

DOER ANDERSON and DOROTHY ANDERSON, his wife; MONT I. ANDERSON and WANDA LEE ANDERSON, his wife; et al.,

Petitioners,

vs.

COUNTY BOARD OF SCHOOL TRUSTEES OF McHENRY COUNTY, ILLINOIS, a corporation; BOARD OF EDUCATION OF McHENRY COUNTY COMMUNITY HIGH SCHOOL DISTRICT No. 156, OF THE CITY OF McHENRY, a municipal corporation; VERNON W. KAYS, County Clerk of McHenry County, et al.,

Respondents.

**BRIEF FOR RESPONDENT, COUNTY BOARD OF SCHOOL TRUSTEES OF McHENRY COUNTY, ILLINOIS, A BODY POLITIC AND CORPORATE, TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS OR TO THE ILLINOIS APPELLATE COURT, SECOND DISTRICT**

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Respondents.

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# BRIEF FOR RESPONDENT, COUNTY BOARD OF SCHOOL TRUSTEES OF McHENRY COUNTY, ILLINOIS, A BODY POLITIC AND CORPORATE, TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS OR TO THE ILLINOIS APPELLATE COURT, SECOND DISTRICT.

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*To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:*

## QUESTIONS PRESENTED.

1. Whether Petitioners have filed their Petition for Writ of Certiorari in this Court within the time pro-

vided by law to confer on this Court jurisdiction to ce
tertain said Petition, and, for this purpose, reference i
made to four of the five prayers stated on page 2 of
said Petition, which are here repeated for the purpos
of convenience: (a) to review the judgment order en
tered August 2, 1957 in Case No. 35064 of the Circu
Court of McHenry County, Illinois; (b) to review the
orders entered May 1, 1959 by the Circuit Court of Mc
Henry County, Illinois, in Case No. 35064 of said Court,
allowing the motion to strike the petition filed thereu
on January 30, 1959, and the order of said Circuit Court
entered June 7, 1959, denying motions to vacate said
order of May 1, 1959; (c) to review the order of the
Illinois Supreme Court, entered September 24, 1959 i
Case No. 35501 of that Court, transferring the appeal
filed thereunder to the Appellate Court for the Second
District of Illinois (Case No. 11353 of said Appellate
Court), and (d) to review the order entered December
9, 1959 by the Appellate Court for the Second Distric
of Illinois, dismissing the appeal in said Case No. 1135
of that Court.

2. Whether in a case presented to a state court havin
jurisdiction of the parties and subject matter, wherei
an opportunity was afforded, but not availed of, to pre
sent Federal questions, and, subsequently, on collatera
attack for the first time Federal questions were pre
sented by amendment to a post-trial motion made with
out authority of law, in a petition filed after appeal
from such case were dismissed and denied for failure to
properly prosecute the same under state appellate pro
cedural law, and thereafter, such Federal questions were
included in appeals to state reviewing courts from the
trial court's ruling denying motion to vacate its orde

striking said collateral attack petition, which appeals were dismissed and stricken by state reviewing courts for failure of appellants to invoke such appellate jurisdiction in accordance with the laws of the State, so that no state court ever passed upon any Federal question, is there jurisdiction in the United States Supreme Court to entertain a Petition for a Writ of Certiorari to review the judgments and orders of the state courts.

## STATEMENT OF THE CASE

Because Petitioner's statement of the case is not only inaccurate throughout, but is misleading and incomplete, it is necessary that Respondent, County Board of School Trustees of McHenry County, Illinois, a body politic and corporate, furnish this Honorable Court with a true and correct statement of the facts as they relate to the issues involved.

On November 14, 1956, County Board of School Trustees of McHenry County, Illinois, Respondent herein, filed its Petition to Condemn certain real property situated in the City of McHenry, Illinois, to acquire the fee simple title to said property under the power of eminent domain for public school purposes on behalf of the Board of Education of McHenry High School District No. 156 (Rec. 3, Ill. Sup. Ct. 35793, Abst. Tr. Ct. Rec. 1-5). Jurisdiction over all named parties defendant in the original Petition to Condemn and in the amendment thereto was acquired (Rec. 3, Ill. Sup. Ct. 35793, Abst. Tr. Ct. Rec. 6). Petitioners herein, who were defendants in the trial court, were all represented by counsel at the trial of the cause (Pet. Writ Cert. 6). No Motion to

Dismiss (Demurrer) or Traverse was filed in the trial court on behalf of Petitioners herein raising any Federal question. The jury viewed the premises sought to be taken, and the case proceeded to trial on the question of just compensation to be paid for the taking of the subject property. (Rec. 3, Ill. Sup. Ct. 35793, Abst. Tr. Ct. Rec. 19). Jury verdict was returned July 31, 1957, determining just compensation to owner or owners, and persons interested in the land sought to be taken, to the fee simple title thereto, the sum of $14,500.00. (Rec. 3, Ill. Sup. Ct. 35793, Abst. Tr. Ct. Rec. 11) Judgment order on the verdict was entered August 2, 1957. (Rec. 3, Ill. Sup. Ct. 35793, Abst. Tr. Ct. Rec. 14-15) Post-trial motion was filed August 30, 1957 by the Petitioners herein, moving the trial court to vacate the verdict of the jury and set aside the judgment on the verdict, and to grant a new trial for reasons therein stated. No ground urging violation of any Federal right of said Petitioners was stated in said post-trial motion. (Rec. 3, Ill. Sup. Ct. 35793, Abst. Tr. Ct. Rec. 15-17). Said post-trial motion was denied on September 26, 1957 (Rec. 3, Ill. Sup. Ct. 35793, Abst. Tr. Ct. Rec. 17). Petitioners insist in the Petition for Writ of Certiorari now before this Court, that there were three contracts for the sale of lots in the subdivision involved in the case. (Pet. Writ Cert. 7). The record shows that only one contract for the purchase of a lot in said subdivision was offered in evidence in the trial court. (Rec. 3, Ill. Sup. Ct. 35793, Abst. Tr. Ct. Rec. 41). The objection to the offer of proof of said alleged contract for the reason that it was void was sustained by the trial court (Rec. 3, Ill. Sup. Ct. 35793, Abst. Tr. Ct. Rec. 41-43). Exhibit 1, consisting of a copy of the recorded plat of subdivision of the property under consideration (erroneously stated to have been filed in the office of the Recorder of McHenry

County on January 30, 1950, but actually recorded January 31, 1956, copy of which is attached to and made part of Rec. 3, Ill. Sup. Ct. 35793, Abst. Tr. Ct. Rec. Appendix), which was admitted into evidence without objection (Rec. 3, Ill. Sup. Ct. 35793, Abst. Tr. Ct. Rec. 40), showing dedicated streets thereon. There is no evidence in the record that there was any acceptance of said dedicated streets by public authority, as required by Illinois law.

On November 21, 1955, Petitioners appealed to the Illinois Supreme Court (Case No. 34738 thereof) from the original condemnation trial and judgment entered therein, pursuant to the appeal section of the Illinois Eminent Domain Act (Chapt. 47, Sec. 12, Ill. Rev. Stat. 1955) (Pet. Writ Cert. 6). Said appeal was dismissed by order of the Illinois Supreme Court, entered April 18, 1958, for failure to file briefs and abstracts on time (Pet. Writ Cert. 6, 7) after Petitioners herein had been granted three extensions of time for filing of such brief and abstract (Rec. 36, Ill. Sup. Ct. 35780).

After such dismissal of the above original appeal to the Illinois Supreme Court, Petitioners herein, on August 5, 1958 filed their Petition in the Illinois Supreme Court (Case No. 34980 thereof) for Leave to Appeal within one year, under Section 76 of the Illinois Civil Practice Act, which provides, *inter alia*, that,

> "* * * notice of appeal may be filed * * * within 1 year from the entry of the order, decree, judgment or other determination, and upon a showing by affidavit that there is merit in appellant's claim for an appeal and that the * * * failure properly to prosecute an appeal which was perfected * * * was not due to appellant's culpable negligence."

On September 16, 1958, the Illinois Supreme Court denied said Petition for Leave to Appeal (Rec. 4, Ill.

June 1, 1959. (Rec. 4, Ill. Sup. Ct. 35793, Supp. Abst. Rec. 47-51). No Federal question was raised in said motion to vacate.

On July 7, 1959, two of the defendants in the original condemnation case filed a petition adopting the allegations and prayers of the above Petition filed January 30, 1959 (Rec. 4, Ill. Sup. Ct. 35793, Supp. Abst. Rec. 53-54; Pet. Writ Cert. 10). Said July 7, 1959 Petition was stricken, on motion, on July 7, 1959, and on the same day an oral motion to Vacate said striking order and the order entered June 1, 1959 striking the Petition of January 30, 1959 was denied (Pet. Writ Cert. 10).

Thereafter, on July 31, 1959, Petitioners herein filed their Notice of Appeal from the original judgment order entered August 2, 1957, from the order entered September 26, 1957 denying the post-trial motion, from the order entered May 1, 1959 granting the motion to strike the Petition filed January 30, 1959, from the order of July 7, 1959 denying the motion to vacate said order of May 1, 1959 and for other relief, from the order entered July 7, 1959 granting the motion to strike the petition of Kenneth and Betty Chance filed on the same day, from the order entered on the same day denying the Chances motion to vacate said order striking their petition, and from the order entered July 7, 1959 denying the motion of the same date of all the Petitioners herein to determine who was entitled to the money adjudged just compensation. (Rec. 4, Ill. Sup. Ct. 35793, Supp. Abst. Rec. 56-58). Thereafter, on July 31, 1959, Petitioners herein filed their Praecipe for Record asking the Clerk of the Circuit Court of McHenry County, Illinois to prepare a full and complete record of the above entitled cause (Case No. 35064, McHenry County Circuit Court incorporating by reference the transcript of the

ord filed in Illinois Supreme Court Case No. 34738 (the original appeal) and used in Case No. 34990 of said Court), (the petition for leave to appeal after dismissal of the original appeal) but setting out verbatim every affidavit, motion, notice and petition filed since April 15, 1958 and every order, judgment or decree entered thereon since April 15, 1959 (Rec. 4, Ill. Sup. Ct. 35793, Supp. Abst. Rec. 59). The appeal pursuant to said Notice of Appeal last mentioned and Praecipe for Record was filed in the Supreme Court of Illinois on September 10, 1959 as Case No. 35591 (Rec. 5, Ill. Sup. Ct. 35793, Abst. App. Ct. Rec. 14). On September 24, 1959, motion of the School Trustees to dismiss said Case No. 35591 was denied, and on the same date, on the Illinois Supreme Court's own motion, the appeal was transferred to the Appellate Court for the Second District of Illinois. On September 28, 1959 that portion of the record that accompanied the Notice of Appeal filed July 29, 1959 was forwarded by the Illinois Supreme Court Clerk to said Appellate Court. Said record was filed in the Appellate Court on September 29, 1959. (Rec. 5, Ill. Sup. Ct. 35793, Abst. App. Ct. Rec. 14).

On October 28, 1959, Petitioners herein filed a motion in the Appellate Court for an extension of time to and including November 30, 1959 in which to file abstracts and briefs. (Rec. 5, Ill. Sup. Ct. 35793, Abst. App. Ct. Rec. 15). Rule 9(2) of said Appellate Court provides that abstract and brief of appellant must be filed in the Clerk's office on, or before 30 days after the filing of the record on appeal (Pet. Writ Cert. 18a). Said motion was denied by the Appellate Court on November 16, 1959. (Rec. 5, Ill. Sup. Ct. 35793, Abst. App. Ct. Rec. 16). On November 3, 1959, the record of the Supreme Court of Illinois, Case No. 34738, (the original appeal) was filed

in the office of the Clerk of the Appellate Court. (Rec. 5, Ill. Sup. Ct. 35793, Abst. App. Ct. Rec. 15). On December 9, 1959, the Appellate Court, pursuant to its Rule 9, entered Appellate Court Case No. 11353 dismissed for failure to file abstract of record and brief and argument. (Rec. 5, Ill. Sup. Ct. 35793, Abst. App. Ct. Rec. 18). On January 4, 1960, Petitioners herein filed a motion in the Appellate Court to vacate its dismissal order of December 9, 1959, and, amongst other grounds, stated that unless said order is vacated, the appellants therein will be deprived of their right to appellate review without due process of law by State action in violation of Article 2, Section 2 of the Illinois Constitution and the Fourteenth Amendment to the Constitution of the United States. (Rec. 5, Ill. Sup. Ct. 35793, Abst. App. Ct. Rec. 18, 19). On January 9, 1960, the Appellate Court overruled and denied said motion. (Rec. 5, Ill. Sup. Ct. 35793, Abst. App. Ct. Rec. 29, 30). Petitioners herein on January 14, 1960, filed a motion in the Appellate Court, amongst other things, to vacate its order of December 9, 1959 dismissing the appeal on the ground, amongst others, that Rule 9 of Appellate Court, Second District, as construed and applied by that Court in its order of December 9, 1959 and its order of January 9, 1960 denying a previous motion to vacate said order of dismissal is a violation of Article 2, Section 2 of the Constitution of Illinois and the Fourteenth Amendment, Section 1 to the Constitution of the United States, in that it requires the filing of abstracts and briefs before and without the filing of a complete record in the cause in a situation in which the appellants have no control over the record in violation of Section 76 of the Illinois Civil Practice Act and Illinois Supreme Court Rule 47. The motion was denied on January 18, 1960. (Rec. 5, Ill. Sup. Ct. 35793, Abst. App. Ct. Rec. 31). There-

after, on February 25, 1960, Petitioners filed their Notice of Appeal as a matter of right to the Illinois Supreme Court from the order of the Appellate Court entered December 9, 1959 dismissing the appeal for failure to file abstracts and briefs as required by Rule 9, and from each order entered in the Appellate Court thereafter, including the order entered thereon denying the motion filed therein on January 30, 1960, claiming that the case involves the validity of a statute, &c. Rule 9, and the question having arisen for the first time in the Appellate Court. (Rec. 5, Ill. Sup. Ct. 35780, Abst. App. Ct. Rec. 416. On March 28, 1960, the School Trustees filed a motion in the Illinois Supreme Court (Case No. 35780) to dismiss said appeal for the reasons that said Notice of Appeal as a matter of right from the Appellate Court of Illinois, Second District, to the Illinois Supreme Court was not filed on or before February 2, 1960, as required by Section 74(3) of the Illinois Civil Practice Act; that appeal cannot be laid from any orders denying motions filed by appellants in the Appellate Court after December 24, 1959, the last day under the Appellate Court rule that a petition for rehearing could be filed, and any motions made after December 24, 1959 were to a court which had lost jurisdiction, and, therefore, no appeal can lie from any orders entered on motions after December 24, 1959, nor from any motion made between December 9, 1959 and December 24, 1959, because the only method of procuring a review of the dismissal order was by petition for rehearing, and not by motion. (Rec. Ill. Sup. Ct. 35780, 27, 31, 32). On March 30, 1960 the Supreme Court granted said motion to dismiss the appeal (Rec. Ill. Sup. Ct. 35780, 52, 53).

On March 12, 1960, Petitioners herein filed a petition in the Illinois Supreme Court under Case No. 35780

thereof for leave to appeal from the Appellate Court, Second District. (Rec. 2, Ill. Sup. Ct. 35793). On March 16, 1960, the School Trustees filed a motion to strike said petition for leave to appeal to the Illinois Supreme Court from the Appellate Court of Illinois for the reason that said petition for leave to appeal was not filed in the Supreme Court within 40 days after the judgment of the Appellate Court became final through the expiration of the time within which a petition for rehearing might have been filed in said Appellate Court (no petition for rehearing having been filed therein), as provided by Section 75 of the Illinois Civil Practice Act (Chapter 110, Illinois Revised Statutes 1959, Section 75) (Rec. 6, 9, 10, Ill. Sup. Ct. 35793). On March 30, 1960, the Illinois Supreme Court in Case No. 35793 ordered the petition for leave to appeal stricken. (Rec. 39, 40, Ill. Sup. Ct. 35793).

## REASONS FOR DENYING CERTIORARI.

**1. The Petition for Writ of Certiorari is not filed within the time prescribed by law as to four of the five matters referred to in the prayers of said Petition.**

Title 28, U. S. C. A., Chap. 133, Sec. 2101, provides in part:

> "(a) A direct appeal to the Supreme Court from any decision under sections 1252, 1253 and 2282 of this title, holding unconstitutional in whole or in part, any Act of Congress, shall be taken within thirty days after the entry of the interlocutory or final order, judgment or decree. * * *.
>
> "(b) Any other direct appeal to the Supreme Court which is authorized by law, from a decision of a district court * * *.
>
> "(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil

action, suit or proceeding before the Supreme Court for review shall be taken or applied for *within 90 days after the entry of such judgment or decree*. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding 60 days." (Italics supplied)

In commenting on a prior statute dealing with the same subject, this Court in *Rust Land Co. v. Jackson*, 250 U. S. 71, 76, said:

"On the eve of the argument a writ of certiorari was applied for; but as this was long after the expiration of the three months limited by § 6 of the Act of September 6, 1916, the application cannot be entertained, irrespective of whether the record shows a proper case for the allowance of that writ."

Under the above rule, the prayer of Petitioners herein to review by certiorari (a) the judgment order entered August 2, 1957 in Case No. 35064 of the Circuit Court of McHenry County, Illinois, to review (b) the order entered May 1, 1959 in said Circuit Court case allowing the motion to strike the Petition filed therein on January 30, 1959, and the order entered July 7, 1959 denying the motion to vacate said order of May 1, 1959, and to review (c) the order of the Illinois Supreme Court entered September 24, 1959 in Case No. 35501 of that Court transferring the appeal filed thereunder to the Appellate Court of Illinois, certainly cannot be entertained by this Court through Petition for Writ of Certiorari filed in this Court on June 30, 1960, pursuant to extension of time granted May 4, 1960 on motion filed April 27, 1960 extending filing date to June 28, 1960 and motion filed June 28, 1960 further extending the filing date to July 1, 1960. The date on which the first mo-

tion for extension of time to file said Petition for Writ of Certiorari, namely, April 27, 1960, to paraphrase the language of the *Rust Land Co.* case, "was long after the expiration of the 90 days limited by the statute" (Title 28, U. S. C. A., Chap. 133, § 2101(c)). Accordingly, the petition for review by certiorari of the judgment and orders above in this paragraph referred to should be denied, as the petition for such review has not been filed, nor was the motion asking for an extension of time within which to file said petition, filed within the time allowed by statute. For this reason alone, the Petition for Writ of Certiorari should be denied as to said judgment and orders of the Illinois trial and Supreme courts.

The prayers in the Petition for Writ of Certiorari filed herein (Petition page 2), in addition to the above matters for which review is asked by certiorari, asks to review an order by the Illinois Appellate Court, Second District, dismissing the appeal of Petitioners herein, pending in that Court on transfer from the Supreme Court of Illinois. Said order of dismissal was entered on December 9, 1959. (Petition page 2). For the obvious reason of attempting to avoid the time limitation for filing a Petition for Writ of Certiorari under the above statute, Petitioners, at page 2 of their Petition, state that said order "was entered on December 9, 1959, and became final on February 1, 1960, upon expiration of the term, while a motion to vacate the order of dismissal was still pending." Said statute allows 90 days after the entry of judgment or decree in which to file writ of certiorari to this Court for review of judgments or decrees. Under the heading "JURISDICTION", Petitioners state that the order of the Illinois Appellate Court dismissing said appeal was *entered* on December 9, 1959. This was a final order disposing of the case. Petitioners on March 12, 1960 filed a Petition for Leave

to Appeal "from an order of December 9, 1960 (erroneously stated to be December 9, 1960, but should have been stated December 9, 1959), dismissing the appeal to the Appellate Court for failure to file abstract and brief as required by Rule 9 of that Court, and from subsequent orders of that Court refusing to vacate the order of dismissal (Rec. 2, Ill. Sup. Ct. 35793, pp. 1, 2).

The School Trustees, Respondent herein, on March 16, 1960, filed their motion to strike said Petition for Leave to Appeal on the ground that the same was filed in the Illinois Supreme Court on March 12, 1960, and, was, therefore, not filed in said Court within 40 days after the judgment of the Appellate Court became final through the expiration of the time within which a petition for rehearing might have been filed in the Appellate Court (no petition for rehearing having been filed therein), as provided by Section 75 of the Illinois Civil Practice Act. (Chapter 110, Illinois Revised Statutes 1959, Section 75) (Rec. 6, 9, 10, Ill. Sup. Ct. 35793). On March 30, 1960, the Illinois Supreme Court considered said Petition for Leave to Appeal, the abstract of record and said motion to strike the Petition for Leave to Appeal, and ordered the Petition for Leave to Appeal stricken (Rec. 39, 40, Ill. Sup. Ct. 35793).

The grounds, appearing above, set forth in the motion to strike said Petition for Leave to Appeal were based upon the Illinois statutory time table dealing with perfecting appeals from Illinois Appellate Courts to the Illinois Supreme Court. It is obvious from the above that the Appellate Court order of dismissal, entered December 9, 1959, is the *final* order involved in that case. It is clear that by the granting of the above motion to strike the Petition for Leave to Appeal, the Illinois

Supreme Court rule is that the time in which to file such petition, is figured from the date of the entry of the order in the Appellate Court. The petitioners herein cannot, by filing petition after petition in the State Appellate Court to vacate the order entered December 9, 1959, change the rule of the Illinois Supreme Court that the time is to be figured from December 9, 1959, the date of entry by the Appellate Court of the dismissal order. Illinois treats it as the effective date under its appellate procedure, and, therefore, this Court will follow local Illinois appellate law in that regard.

This Court, in *United Gas Co.* v. *Texas*, 303 U. S. 123, 139, said:

> "With respect to the proceedings in the State courts, appellant urges that the case was not tried and determined as required by state law, and we are referred to the state statutes and the decisions of the Texas courts as to the proper procedure in the trial court *and on appeal*. It is not our function, in reviewing a judgment of the state court, to decide local questions. We are concerned solely with asserted federal rights. The final judgment of the state court in the instant case must be taken as determining that the procedure actually adopted satisfied all state requirements. (citing cases)" (italics supplied)

Accordingly, the Petition for Writ of Certiorari in this case with respect to review of said December 9, 1959 order comes more than 90 days after its entry, and hence it is too late.

In *Matton Co.* v. *Murphy*, 319 U. S. 412, this Court said:

> "The purpose of statutes limiting the period for appeal is to set a definite point of time when litigation shall be at an end, unless within that time the

prescribed application has been made; and if it has not, to advise prospective appellees that they are freed of the appellant's demands. Any other construction of the statute would defeat its purpose. Would-be appellants could prolong indefinitely the appeal period, by making application to one judge within the three months and upon the denial by applying successively to other judges even after the prescribed time for appeal has ended."

Petitioners herein, by inventing a rule that the order of December 9, 1959 did not become final until February 1, 1960 "upon expiration of the term, while a motion to vacate the order of dismissal was still pending" cannot change the Illinois law that an order disposing of an appeal in the Appellate Court must be filed within the time above noted. The whole history of this litigation, as shown by the statement of the case, set forth in this brief, from the first appeal to the Illinois Supreme Court in Case No. 34738 of that Court has been one of delay after delay, motions and petitions for extensions of time on flimsy grounds, filing of new proceedings after the old ones proved to be of no avail, and threats of further proceedings. The filing of motions to vacate final judgment orders has been a much used tactic by the Petitioners herein throughout the long history of this litigation, which began with a simple condemnation case for the acquisition of land for school purposes which a jury evaluated at $14,500.00.

Accordingly, the Petition for Writ of Certiorari is filed too late with respect to sub-paragraph (d) above, which is the order entered in the Appellate Court on December 9, 1959, as well as with respect to the judgment and orders set forth under sub-paragraphs (a), (b) and (c) above.

Thus far we have shown that there is no jurisdiction to review in this case because the Petition for Writ of Certiorari has not been filed in this Court within the time provided by law except as to the matters involved in Illinois Supreme Court Case No. 35780.

We here point out that the prayers contained on page 2 of the Petition for Writ of Certiorari do not ask for a review of the order entered by the Illinois Supreme Court on March 30, 1960 in Case No. 35793 of that Court, striking the Petition for Leave to Appeal from the order of the Appellate Court of December 9, 1959 dismissing the appeal in that Court. Although said order, sustaining said motion to strike, is not included in the prayers of the Petition for Writ of Certiorari, at page 12 of said petition, under the Statement of the Case, Petitioners herein show that said Illinois Supreme Court case was filed in that Court on March 12, 1960 and raised two constitutional questions. It stated that Rule 9 of the Illinois Appellate Court, as construed and applied by said Court in its order of December 9, 1959, and subsequent orders, is a violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States, in that it requires the filing of abstracts and briefs before and without the filing of a complete record in the case in a situation in which the litigants have no control over the record, and in violation of Section 86 of the Illinois Civil Practice Act and Illinois Supreme Court Rule 47, and in violation of said section of the Fourteenth Amendment because it deprives Petitioners of their right of Appellate review without due process of law.

At page 31 of the Petition for Writ of Certiorari under Argument, Point III, the statement is made that "the action of the Supreme Court in striking their petition for leave to appeal which was based on that ground

the dismissal of the appeal by the appellate court deprived them of their right to appellate review without due process of law, the State of Illinois has deprived them of their property without due process of law in violation of their federal rights under the 14th amendment or has attempted to do so." We contend that because these matters which Petitioners herein have included in the Statement of the Case and in the argument with reference to Illinois Supreme Court Case No. 35793 are not the subject of the prayer for review by certiorari (Petition for Writ of Certiorari 2) it is not properly reviewable in this case, and, in support of this position we submit the case of *Flournoy* v. *Wiener*, 321 U. S. 253, where at pag 259 this Court said:

> "It is a familiar rule, consistently followed, that upon appeal from a state court this Court will not pass upon or consider federal questions not assigned as error or designated in the points to be relied upon, even though properly presented to and passed upon by the state courts. (Citing cases). The rule is the same in the case of applications for certiorari. Rule 38, par. 2; *General Pictures Corp.* v. *Western Electric Co.*, 304 U. S. 175, 179; *National Licorice Co.* v. *Labor Board*, 309 U. S. 350, 357."

Because Petitioners herein have not included Illinois Supreme Court Case No. 35793 in their prayer, as aforesaid, there is no assignment of error with respect to that case, and a reading of the conglomeration of language contained in Point III at page 28 of the Petition for Writ of Certiorari certainly does not show that there has been any designation with reference to said Illinois Supreme Court case in points relied upon.

**2. No Federal question was ever presented to the state courts, nor did the state courts ever pass upon any Federal question, and, that being true, there is no jurisdiction in the United States Supreme Court to review the state courts judgments and orders by certiorari.**

The foundation of Petitioners' contention that they were denied due process of law under the Fourteenth Amendment to the Constitution of the United States is based upon their claim that there are separate ownerships of tracts or parcels of land in the property condemned. They claim that three lots were sold under contract, one to the Mont Andersons, the second to the Lingenfelters, and a third to the Chances (Pet. Writ Cert. 17). They further claim that the plat of subdivision conveyed a fee simple title to certain streets to the City of McHenry, Illinois, which streets are marked on such plat as dedicated or granted to the public (Pet. Writ Cert. 16). Accordingly, they claim that there are four or five parcels of land involved, the first being all the unsold lots in the subdivision, three separate parcels constituting the lots sold under contract, and the remaining parcel consisting of streets owned by the City of McHenry (Pet. Writ Cert. 17). We now address our attention to the question of whether or not there are separate parcels involved without considering that even if there are separate parcels, that there is any Federal question involved upon which the Petition for Writ of Certiorari can be entertained by this Court. The alleged contract for the purchase of one of said lots by the Mont Andersons was offered into evidence in the trial court. Said alleged contract provided for the sale to the Mont Andersons of one lot in the subdivision at a price of $3,000.00, of which $1,000.00 was paid on the date of the execution of the agreement and the balance of $2,000.00 is payable at the rate of $25.00 per month until such time as Dorr An-

derson (who, with his wife Dorothy Anderson, are the sellers of said lot) is ready to construct for said buyers a residence (Plan No. C-825 as per separate agreement) (Rec. 3, Ill. Sup. Ct. 35793, Abst. Tr. Ct. Rec., Rec. Appendix). The Mont Anderson contract was offered in evidence in the trial court, and the attorney for the School Trustees objected to the offer of proof thereof for two reasons, first, the seller thereunder is not bound to do anything, and, therefore, it is not a contract but only an illusory promise, and second, the separate agreement to build a residence is not identified in the "contract". The trial court sustained the objection to the offer of proof (Rec. 3, Ill. Sup. Ct. 35793, Abst. Tr. Ct. Rec. 41-43). There is no question that the Mont L. Anderson "contract" is illegal for both of the above reasons.

In Section 104, Volume 1, Williston on Contracts, Revised Edition, the learned author says that with reference to illusory contracts:

> "Such a promise is a promise merely in form. Even if recognized by law it would impose no obligation, since the promisor by virtue of the condition always has it in his power to keep his promise and yet escape performance of anything detrimental to himself or beneficial to the promisee."

In Section 2, American Law Institute Restatement of the Law of Contracts, an illusory promise is defined as:

> "An apparent promise which according to its terms makes performance optional with the promisor whatever may happen, or whatever course of conduct in other respects he may pursue, is in fact no promise although often called an illusory promise."

Accordingly, the promise of Dorr Anderson to construct for buyer a residence (Plan No. C-825) at such time as he, Dorr Anderson, is ready as per separate agreement,

is no promise at all, nor can it serve as consideration for the alleged purchaser's promise to pay the monetary consideration agreed upon. It is an illusory promise, and the purported contract is void. The trial court was right in keeping said "contract" out of evidence. The "contract" is void for the further reason that the separate agreement is in no way identified in the written "contract" document. Therefore, the "contract" is void for uncertainty, because there is nothing in the document to make it certain. *Mode v. Whiteley*, 30 Fed. Supp 129, 130; *Cartelyou v. Barnsdall*, 236 Ill. 138, 142. The Lingenfelter and Chance "contracts" were never offered in evidence, and an examination of the same in the appendix to the abstract of the trial court record in Illinois Supreme Court Case No. 35793 shows that the same language appears in them.

Since these "contracts" were void, let us examine the claim made at page 16 of the Petition for Writ of Certiorari that they placed equitable title in the purchasers. We concede that these alleged contract purchasers were made parties along with the fee owner to the original petition to condemn. This was done under Illinois law, which holds that every person claiming an interest in land is a proper party defendant to a condemnation petition, even if the claimed interest is invalid. It should be noted, from the recording dates shown on the documents in the above Appendix, that the three "contracts" were recorded against the property, shortly before the filing of the condemnation suit in the trial court.

In *Sanitary District of Chicago v. Mansor*, 264 Ill. 256, 259, the Court said:

> "The holder of a fax title is a proper party to the condemnation proceeding, for the statute requires the petition to set forth the names of all persons in

terested in the property as owners or otherwise, as appearing of record. The object of the proceeding is to acquire the entire title free from any encumbrances or liens, and therefore every person claiming an interest in the land is a proper party. A tax deed either conveys the paramount title or it conveys nothing; and a petitioner seeking to condemn the land has a right to have that question determined, for upon it depends the important question of the ownership of the land."

In *Sanitary District* v. *Murphy*, 291 Ill. 269, 272, after holding that the holder of an invalid tax title may be made a party defendant to a condemnation petition, the Court said:

"These tax titles, if invalid, could not vest appellant with any interest in the land."

Accordingly, since the three alleged "contracts" for the purchase of lots involved in this proceeding are invalid under the law of Illinois, the purchasers did not thereby acquire any interest in the land, and the assertion in the Petition for Writ of Certiorari that they hold equitable interests is false. They have no interests, legal or equitable, and, that being so, they are not owners of separate tracts of land.

As to the claim that the City of McHenry is the owner of the streets and alleys because they were dedicated on the plat of subdivision, it is the law of Illinois that mere dedication by a plat of subdivision does not vest title to public streets in the municipality.

In *Moore* v. *City of Chicago*, 261 Ill. 56, 58, the Court said:

"The making of a plat of a subdivision and filing the same for record is a mere offer on the part of the owner to dedicate the streets and other public

grounds thereon designated to the public, and no title or rights vest in the public to such public grounds until there has been an acceptance of the offer."

There are so many authorities to this effect in Illinois that to list them would be only cumulative.

Since the evidence does not show any acceptance of the offer of dedication of streets shown on the plat of subdivision, the City of McHenry acquired no title or interest in the streets, and, because there was no doubt that said City had no such interest, it was not made a party to the condemnation petition. Therefore, the City of McHenry did not own a separate parcel or tract of land for which a separate award should have been made.

Under the above circumstances, it is clear that since the alleged "contract" purchasers and the City of McHenry had no interest in the land being condemned, the only remaining interest in the property was that of Dorr Anderson and Dorothy Anderson, who are the owners of the property by purchase in 1947 (Rec. 3, Ill. Sup. Ct. 35793, Abst. Tr. Ct. Rec. 56). Under Illinois statute, where title to a tract of land is owned by two or more persons, unless title is expressly declared not to be in tenancy in common, it shall be deemed to be in tenancy in common (Chap. 76, Ill. Rev. Stat. 1945, Sec. 1). Accordingly, since there is no showing in the evidence with respect to the kind of title Dorr and Dorothy Anderson held in the property under condemnation, their title is deemed to be that of tenancy in common, and, that being so, without bothering to show authority, they each held an undivided interest in one title and one tract of land. That being so, there is only one tract of land being condemned, and the entire factual basis upon which the Petitioners herein base their claim falls. The only parties

having an interest in the land condemned are Dorr and Dorothy Anderson. They appeared at the trial of the case and presented testimony in the trial court. They cross-examined the School Trustee's witnesses and presented their witnesses. Their counsel presented arguments, and the jury returned a verdict upon which the Court entered a judgment order.

In *Pittsburg, etc.* v. *Backus*, 154 U. S. 421, 426, 427, this Court said:

> "A hearing before judgment, with full opportunity to present all the evidence and the arguments which the party deems important, is all that can be adjudged vital. Rehearings, new trials, are not essential to due process of law, either in judicial or administrative proceedings. One hearing, if ample, before judgment, satisfies the demand of the Constitution in this respect."

The Andersons have been afforded due process of law. They do not need any special rule or standard in order to get the award deposited for their use with the County Treasurer. None of the Petitioners asked in the trial court for separate verdicts as to the claimed separate parcels, and, since we have seen above that there were no separate parcels, it is clear that they did not so ask for separate verdicts because there were no separate parcels, but only one parcel, and, under those circumstances, the single verdict for the single tract involved in the proceedings was correct.

The claim at page 20 in the Petition for Writ of Certiorari that the County Treasurer is unable to pay the award deposited with him, because he has no way of knowing who is entitled to receive it, is incorrect. The only party having an interest is Dorr and Dorothy Anderson, as tenants in common, and the County Treasurer can pay

money to them according to their rights as tenants in common.

We call the Court's attention to the fact that a search of the entire trial court record fails to show that the question of the Fourteenth Amendment to the Constitution of the United States was ever raised in the trial court. The recognized way to raise legal objections, under the law of Illinois, to a petition to condemn, is by motion to dismiss (demurrer) or by traverse.

In *O'Hare v. C. M. & N. R. R. Co.*, 139 Ill. 151, before the impaneling of the jury to assess compensation, appellant sought to orally traverse the allegations of the petition to condemn, and moved that the question of the necessity of the appropriation of appellant's property, and whether the parties were unable to agree to be submitted to the jury. On appeal, the Court upheld the trial court's denial of the motion. At page 159, the Court said:

> "* * * upon petition filed setting up these jurisdictional facts, and otherwise complying with the statute, authorizes a jury to be impaneled to ascertain the just compensation to be made to the owner for the property proposed to be appropriated * * *. We held in *Smith v. Chicago and Western Indiana Railroad Co.*, 105 Ill. 511, that no answer or other formal pleading is contemplated or proper. *It was not, however, intended to be held that the allegations of the petition could not be traversed, or that the averments therein were conclusive upon the land owner.*" (Italics supplied)

In *Department of Public Works and Buildings v. Lewis*, 344 Ill. 253, the Court said that if a petition to condemn does not contain the statutory requisites, the property owner has the undoubted right to contest the right to condemn, and this he may do by motion.

Accordingly, the two last cases are authority for the proposition that a motion to dismiss reaches jurisdictional defects appearing on the face of the condemnation petition, and that a traverse reaches matters which will defeat condemnation jurisdiction, but not appearing on the face of the petition. In any event, employment of either a motion to dismiss or a traverse is necessary to make jurisdictional attack upon a petition to condemn. To the same effect, see *United States v. Nudelman, et al.*, 104 Fed. 2d 549, cert. denied 308 U. S. 589; *Chicago Housing Authority v. Berkson*, 415 Ill. 159.

The statement at page 21 in the Petition for Writ of Certiorari that the Federal rights of the owners under the Fourteenth Amendment, to the Constitution of the United States, Section 1, are violated, because no rule is given and none exists by which the proportionate share of each owner in the award, *i. e.*, just compensation, can be ascertained so that the award fixes no rights and binds no one and has no effect whatsoever, is untrue. We have seen above that there are no proportionate shares in the award, but only one interest in the land involved. However, even if there were multiple interests involved, so that it would be improper to condemn without setting forth the separate parcels involved, if there were separate parcels, then because under the above Illinois authorities, including the *Nudelman* case where a condemnation was brought in a Federal Court under Illinois condemnation procedure under a conformity act, the lack of due process under the Fourteenth Amendment was not pleaded in a traverse or motion to dismiss, the objection was never passed upon the by the trial court before it entered the judgment order. Such lack of due process of law is not set forth in the post-trial motion (motion for new trial) (Rec. 3, Ill. Sup. Ct. 35793, Abst. Tr. Ct. Rec. 15, 16), and, under these circumstances, is waived.

Under Illinois law, alleged error in the trial which is not raised upon written motion for a new trial is waived. *People* v. *Clark*, 9 Ill. 2d 46, cert. denied, 352 U. S. 1002. Section 68.1 of Chapter 110, Illinois Revised Statutes, 1957, provides that relief desired after trial in jury cases or for a new trial must be sought in a single post-trial motion, and that the post-trial motion must contain the points relied upon particularly specifying the grounds in support thereof, and that a party may not urge as error on review of the ruling on his post-trial motion, any point, ground or relief not particularly specified in the motion. *McKinney* v. *Cratty*, 18 Ill. App. 2d 561, 563.

Up to this point, no Federal question was raised in the many proceedings. The trial court case was appealed to the Illinois Supreme Court in Case No. 34738 thereof, which dismissed the appeal for failure, after three extensions of time were granted, to file briefs and abstracts on time. (Rec. 36, Ill. Sup. Ct. 35780). This dismissal was ordered under Illinois procedural appeal law, and did not involve the passing upon by the Illinois Supreme Court of any Federal question. The Petition for Leave to Appeal within one year in Case No. 34990 of the Illinois Supreme Court was also dismissed on Illinois procedural grounds. No Federal question was passed on in this case by the Illinois Supreme Court.

The petition filed thereafter on January 30, 1959 in the trial court to have the entire proceedings declared null and void was stricken on motion of the School Trustees for reasons involving only local Illinois law, and not on the basis of any Federal question. In said petition of January 30, 1959, for the first time in the many proceedings involved, the Petitioners, without authority of law, amended the post-trial motion which was previously

denied by the trial court, and, it was in the record when the appeal was dismissed by the Illinois Supreme Court in its Case No. 34738, and, also in the record in Illinois Supreme Court Case No. 34990, both of which were dismissed by the Illinois Supreme Court on procedural grounds, as aforesaid. Said amendment to the post-trial motion raised the issue of violation of the Fourteenth Amendment to the Federal Constitution.

The ground in the motion to strike the January 30, 1959 petition relating to said amendment of the post-trial motion, was that under Illinois law, Section 68.1(3), of the Illinois Civil Practice Act (Chapter 110, Illinois Revised Statutes 1957, Section 68.1(3)), post-trial motions must be filed within 30 days after entry of judgment or discharge of the jury. We noted in the statement of the case that the amendment to the post-trial motion raising the Fourteenth Amendment to the Federal Constitution was made in the petition filed January 30, 1959, which was more than 30 days after the entry of judgment and more than 30 days after the discharge of the jury. The order of the trial court striking the petition of January 30, 1959, so far as the Federal question of violation of the Fourteenth Amendment to the Constitution of the United States as raised by the aforesaid amendment was concerned, was not decided or passed upon by the trial court, and was not considered by it. The question was not presented in time under the Illinois statute in the premises, and, therefore, the ruling involved in allowing said motion to strike necessarily was on an Illinois procedural ground, namely, that the amendment to the post-trial motion came too late and was therefore of no effect, and, that being so, there was no decision in those trial court proceedings on any Federal question.

At page 30 of the Petition for Writ of Certiorari filed in this case, it is stated by Petitioners that this Court has a duty to inquire whether the action of the trial court in denying Petitioners any relief by striking their petition to vacate the judgment in the eminent domain proceedings, which raised the question that the State of Illinois had, in violation of their Federal rights under the Fourteenth Amendment to the United States Constitution, deprived them of their property without due process of law, or was attempting to do so by refusing to vacate the order of striking. It is obvious that this refers to the order of the trial court striking the petition filed January 30, 1959 to declare the entire proceedings in the condemnation case null and void. We have shown above that because the claim of violation of the Fourteenth Amendment was contained in an amendment to the post-trial motion, not permitted under Section 68.1(3) of the Illinois Civil Practice Act, the Court in that case did not pass upon the Federal question, but the order striking the question was merely on the ground that the amendment raising the due process question violated Illinois procedural law, and hence, the order striking the petition of January 30, 1959 did not pass upon any Federal question. Under these circumstances, it cannot be truthfully said that because of said order of the trial court, Petitioners were prevented by an Illinois court from raising a Federal question; if there is any prevention involved, which we do not concede, the Petitioners themselves prevented a passing upon the Federal question by the trial court before which the January 30, 1959 petition was presented, by not raising the Federal question in the original condemnation case by motion or traverse, as required under Illinois procedural law. They could have raised the Federal question then, but did not, and, even if they had

raised the Federal question properly in a motion or traverse, their appeal from the original condemnation case was dismissed, as we have shown above, because the briefs and abstracts required to be filed were not filed in time, even after three extensions of time. This, we said above, and we here repeat, was a dismissal under Illinois procedural law.

The statement at page 30 of the Petition for Writ of Certiorari that the action of the Illinois Supreme Court in transferring the appeal to the Illinois Appellate Court, whereas, it should under Illinois statute have remained in the Supreme Court, was in violation of Petitioner's Federal rights under the Fourteenth Amendment, because its prevented a review of the order striking the January 30, 1959 petition, is untrue. Their claim of lack of due process under the order of transfer is fallacious. It could not have denied them due process of law, because we have seen above that the petition of January 30, 1959 was in itself a petition to vacate all of the proceedings in the condemnation case to date, including the judgment order entered in the trial Court on August 2, 1957 awarding just compensation of $14,500.00. Also, there was a motion to vacate the order striking said petition of January 30, 1959.

Illinois law holds that an appeal from a motion to vacate a judgment in a case does not involve an appeal from the merits of the case, but is an appeal from the order denying the vacating of the judgment or decree. See *Clasen* v. *Ripley*, 407 Ill. 350, where at pages 351-2, the Illinois Supreme Court referred to *Carnes* v. *Quinn*, 358 Ill. 446, where the Court held that an appeal from the denial of a motion to vacate a decree of the trial court did not involve the merits, but

> "The question raised does not go to the merits but is only a question of practice. When questions of practice, only, are raised, the appeal must be taken to the Appellate Court."

and not to the Illinois Supreme Court. To the same effect, see *McCarthy* v. *McCarthy*, 6 Ill. 2d 42.

In the event Petitioners had succeeded in their appeal from the order striking their petition filed January 30, 1959, the only order which the Illinois reviewing court could have entered, would be to remand with directions to vacate the order sustaining the motion to strike brought under Section 72 and various other sections of the Illinois Civil Practice Act. In this appeal the Court could not have passed upon the merits involved in the January 30, 1959 petition, but only upon the propriety of the trial court's striking the same. This, therefore, involves only a question of Illinois practice. The Court did not prevent a review of any Federal question, because it could not have done so. The order transferring from the Supreme Court to the Appellate Court was merely based upon the fact that the review sought was from a procedural question, viz., the validity of the striking order, and not any substantive question. Again, we find that Petitioners are in error when they claim that they are denied a chance to present the question of due process of law through the Supreme Court's transferring the case to the Appellate Court.

Again, at page 30 of the Petition for Writ of Certiorari, Petitioners herein claim that the dismissal order entered by the Appellate Court for failure to comply with Rule 9 of said Appellate Court prevents them from having the question of due process presented, is also false. We have seen above that the appeal, there under consideration, was

from the order striking the petition of January 30, 1959, and that said appeal was based upon Illinois procedure, not from a ruling on the Fourteenth Amendment to the Constitution of the United States. Rule 9 itself is a procedural rule. It states when briefs and abstracts should be filed. Even if they had been filed, no Federal question of the Fourteenth Amendment or any other substantive question would be passed upon by the Appellate Court because that appeal itself was on a procedural ground. It is amazing that anybody can claim that a dismissal of any appeal not involving any Federal question can prevent a review of such question. It was not involved in the appeal, and, therefore, it can not be, by the very nature of the appeal, passed upon by the reviewing court. The same is true with respect to the Petition for Leave to Appeal from the above order of the Illinois Appellate Court to the Illinois Supreme Court, and the appeal as a matter of right from the Appellate Court to the Supreme Court. Both said Petition for Leave to Appeal and said so-called appeal as a matter of right are based upon the Appellate Court's right to dismiss under its procedural Rule 9. There was no prevention in either of these last two Illinois Supreme Court cases from raising the question of due process of law. The question of due process of law was never presented to the Court in either of these two cases, and, even if the Court had permitted the appeal under the Petition for Leave to Appeal or had heard the appeal under said appeal as a matter of right, the Court would have passed upon the validity of the order of the Appellate Court in dismissing the appeal under its procedural Rule 9; in other words, the Court would have decided whether or not, as a matter of procedure, the Appellate Court was correct in dismissing the case for procedural non-compliance with its Rule 9.

Since the question of due process of law under the Fourteenth Amendment could never have been passed upon by the trial court under the January 30, 1959 petition because, as we have shown above, the amendment to the post-trial motion came too late under Illinois procedural law, any appeal thereafter could not involve deprivation of Petitioner's rights under the Fourteenth Amendment. The trial court never passed upon it, and could not pass upon it, and, since that was true, there never could have been a review of that which was not passed upon, because Petitioners, themselves, prevented it from being passed upon by not complying with Illinois procedural law. They should have raised the Federal question of the Fourteenth Amendment by motion or traverse to the petition to condemn. They did not. Therefore, they waived the right to raise the issue.

Not once in this case, stretching over a period of four years, with its myriad petitions, motions, and other proceedings, including appeals and petitions for leave to appeal, did Petitioners ever properly present to the Illinois courts any Federal question. They never presented the question of deprivation of their rights under the Fourteenth Amendment, and, that being true, it was never, and could never be passed upon by any Illinois court under the pleadings presented.

It is a new thought, the invention of the fertile mind of Petitioners' counsel, that a dismissal under Rule 9 of the Appellate Court in any way involves denial of due process of law. See prevously cited case of *Pittsburg, etc*, v. *Backus*, 154 U.S. 421, 426-7, for the proposition that

> "A hearing before judgment, with full opportunity to present all the evidence and the arguments which the party deems important, is all that can be adjudged vital. Rehearings, new trials, are not essential to due

process of law, either in judicial or administrative proceedings. One hearing, if ample, before judgment, satisfies the demand of the Constitution in this respect."

We have previously shown that in the original condemnation trial there was a service of summons, an opportunity to be heard, the parties were represented in the trial by counsel, evidence against them and for them was presented before a court and jury, there was full opportunity to cross examine all witnesses presented against the Petitioners, there was no objection to any of the instructions to the jury, and there was no valid post-trial motion (motion for new trial) presented raising a Federal question.

In *Ohio v. Akron Park District*, 281 U.S. 74, 80, this Court said:

> "As to the due process of law clause of the Fourteenth Amendment, it is sufficient to say that, as frequently determined by this Court, *the right of appeal is not essential to due process provided that due process has already been accorded in the tribunal in the first instance.* *McKane v. Durston*, 153 U.S. 684, 687; *Pittsburg, etc. v. Backus*, 154 U.S. 421, 427; *Reetz v. Michigan*, 188 U.S. 505, 508; *Rogers v. Peck*, 199 U.S. 425, 435; *Standard Oil Co. of Indiana v. State of Missouri* 224 U.S. 270, 280. The opportunity afforded to litigants in Ohio to contest all constitutional and other questions fully in the Common Pleas Court and again in the Court of Appeals *plainly satisfied the requirement of the Federal constitution in this respect and the State was free to establish the limitation in question in relation to appeals to its Supreme Court in accordance with its views of state policy.*" (italics supplied)

The Petitioners in the case at bar had the opportunity to raise the question of the Fourteenth Amendment to the

Constitution of the United States by traverse or motion to dismiss before the case was heard by the trial court and jury on the question of just compensation, but they failed to do so, and, as this Court said in *Honeyman v. Hanan*, 302 U.S. 375, 378:

> "The Federal Constitution does not undertake to control the power of a State to determine by what process legal rights may be asserted or legal obligations be enforced, provided the method of procedure gives reasonable notice and affords opportunity to be heard before the issues are decided."

Illinois procedural law, allowing traverse and motion to dismiss to raise legal questions in eminent domain proceedings, is the method adopted by Illinois for that purpose. Illinois condemnation law in providing for service of summons and for a complete hearing in condemnation cases before the issues in the case are decided, affords, and in this case, afforded Petitioners herein with a fair opportunity to present all questions of legal rights involved. The fact that they did not choose, at the proper time afforded to them under Illinois law to raise the question of the Fourteenth Amendment to the Federal Constitution, does not mean that they have not had due process of law under the Fourteenth Amendment.

We have seen above that ample opportunity was given to the Petitioners in the case at bar to present the question of due process of law under the Fourteenth Amendment to the Federal Constitution in the trial court, but they did not avail themselves of that opportunity. We have further shown above that in the myriad appellate proceedings involved, all of which were dismissed because of non-compliance with Illinois procedural law, the question of the Fourteenth Amendment could not have been ever presented for review, nor was it ever properly pre-

sented for review or passed upon in any of said appellate proceedings. As was stated by this Court in the leading case of *John* v. *Paulin*, 231 U.S. 583, 585:

> "As the Supreme Court of the State did not pass upon the merits of the case or upon the correctness of any of the rulings below, but, on the contrary, held that it was powerless to do so because its appellate jurisdiction was not invoked in accordance with the laws of the State, we do not perceive any theory upon which its judgment of dismissal may be reviewed by us consistently with the familiar limitations upon our authority. See Rev. Stat., § 709; Judicial Code, 237. Certainly no Federal right was denied by that court, and if, as was held by it, its appellate jurisdiction was not properly invoked, no Federal question was before it for decision.
>
> "Without any doubt it rests with each State to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise; and the state law and practice in this regard are no less applicable when Federal rights are in controversy than when the case turns entirely upon questions of local or general law. *Callan* v. *Bransford*, 139 U.S. 197; *Brown* v. *Massachusetts*, 144 U.S. 573; *Jacobi* v. *Alabama*, 187 U.S. 133; *Hulbert* v. *Chicago*, 202 U.S. 275, 281; *Newman* v. *Gates*, 204 U.S. 89; *Chesapeake & Ohio Railway Co.* v. *McDonald*, 214 U.S. 191, 195."

And, again, in the same case, the Court said at pages 586-87:

> "Thus it appears that nothing was decided but the preliminary question of the court's jurisdiction to pass upon the controverted matters shown in the record, and that this question was resolved according to what the court deemed to be the true construction and effect of applicable provisions of the constitution and laws of the State. In short, the judgment of dismissal turned entirely upon a question of local law.

"As particularly apposite, we quote the following from the opinion in *Neaman* v. *Gates*, *supra*, a case in which this court declined to review a like judgment of dismissal by a state court:"

"'Had the appeal been properly taken it would have been the duty of the Supreme Court of Indiana to pass upon the questions presented by the record before it, including, it may be, a Federal question, based upon the due faith and credit clause of the Constitution, which, on various occasions, was pressed upon the attention of the trial court. In legal effect, however, the case stands as though no appeal had been prosecuted from the judgment rendered by the trial court. As the jurisdiction of this court to review the judgments or decrees of state courts when a Federal question is presented is limited to the review of a final judgment or decree, actually or constructively deciding such a question, when rendered by the highest court of a State in which a decision in the suit could be had, and as for the want of a proper appeal no final judgment or decree in such court had been rendered, it results that the statutory prerequisite for the exercise in this case of the reviewing power of this court is wanting.'"

The case at bar is parallel to the *John* v. *Paullin* case. The question of due process of law under the Fourteenth Amendment was not raised, and was not presented in the petition filed in the trial court on January 30, 1959 in the manner required by Illinois procedural law. Therefore, it was never passed upon in any trial court, and was never, under Illinois law, presented to, or passed upon, by any Illinois reviewing court. To paraphrase the language of the Court in *John* v. *Paullin*, *supra*, in legal effect the case stands as though no appeal had ever been taken from the judgments rendered in the original proceeding in the trial court and in the January 30, 1959 proceeding in the trial court. The question of due process of law was never passed

upon in all the proceedings involved and presented to this Court in the Petition for Writ of Certiorari. Hence, there is no ruling of any Illinois court with respect to the Fourteenth Amendment to the Constitution of the United States to be reviewed by this Court, and, that being so, there is no Federal question involved, and the Petition for Writ of Certiorari must fail.

## SUMMARY OF ARGUMENT.

Under Title 28, U.S.C.A. Chap. 133, Sec. 2101(c), a petition to this Court to review by certiorari judgments of a state court shall be filed in this Court within 90 days after the entry of such judgments in the state courts, or within any extension of such period of time, not exceeding 60 days. This Court has held that any such petition filed thereafter cannot be entertained. The Petition for Writ of Certiorari was not filed within the permitted time, nor within the extended time as to the orders and the judgment shown in Question 1 under Questions Presented in this Brief, and for this reason alone, said Petition should be denied as to said orders and judgment.

Under the ruling of this Court announced in *Flournoy v. Wiener*, 321 U.S. 253, 259, since there was no request in the Petition, to review by certiorari, the order entered March 30, 1960 by the Illinois Supreme Court in its case number 35793, striking the petition for leave to appeal therein, which order was entered under Illinois State procedural law, this Court will not consider that case.

In answer to Petitioners' claim that they were denied due process of law under the Fourteenth Amendment to the Federal Constitution because there was a single award of compensation for the taking by eminent domain of several, not one, parcels of land and that Petitioners

were thereby unable to determine the part of such award applicable to each separate parcel, we showed that there was only one parcel of land involved; we further showed that claimed interests of alleged contract purchasers gave them no interest, legal or equitable, in the land because said "contracts" were void, being illusory and incomplete; in addition, the interest of the City of McHenry as an asserted separate owner of part of the land because of ownership of title to streets in the subject property, which streets were dedicated in said land was non-existent because under Illinois law, dedication by plat of subdivision conveys no title to streets unless there is an acceptance of the dedication by the public. No acceptance was shown in evidence, hence, the City had no interest. We showed that therefore there was only one parcel and one title, the owners of which, as tenants in common, were the sole parties interested therein and the entire award belonged to them.

We further showed that the question of due process under the Fourteenth Amendment to the Federal Constitution was not raised by Motion to Dismiss or Traverse to the original petition to condemn, as required by Illinois procedural law, and was therefore waived, so that question was not passed upon by the trial court. Because of non-compliance with Illinois procedural law, both in the trial and reviewing courts of Illinois, no Federal question was ever presented to, nor passed upon, by any Illinois court. No Illinois reviewing court had the opportunity to pass on the Fourteenth Amendment to the Federal Constitution; because all appeals taken were stricken or dismissed for Petitioner's failure to perfect them as required by Illinois procedural rules governing appellate practice.

The claim of Petitioners that the Illinois courts prevented them from securing any ruling on said Fourteenth

Amendment is untrue, because Petitioners, themselves, never presented the question to any Illinois court due to their own fault in not complying with the procedural requirements for presentation of the question. This situation throws the case squarely within the rule announced by this Court in *John* v. *Paullin*, 231 U.S. 583, to the effect that the case stands as though no appeal had ever been taken from any ruling by the state court on the question of said Fourteenth Amendment, and that being so, there is no ruling of the state court on any Federal question for review by certiorari in this Court.

## CONCLUSION.

For the reasons herein set forth, it is respectfully urged that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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